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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**

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9 Curtis Bridgeman,

10 Plaintiff,

11 vs.

12 CitiMortgage Inc., et al.,

13 Defendants.

No. CV11-1106-PHX DGC

14  
15 **ORDER**

16 All defendants except Provident Funding Associates LP move to dismiss. Doc. 8,  
17 The Court will refer to moving defendants as Defendants or Moving Defendants for  
18 purposes of this order. Plaintiff opposes through counsel (Doc. 11), and Defendants have  
19 filed a reply (Doc. 13). The Court will grant the motion as stated below.

20 **I. Background.**

21 This civil action challenging foreclosure, filed by Plaintiff in Arizona Superior  
22 Court for Maricopa County (Doc. 1-2), was removed to this Court by Defendants on  
23 grounds of diversity jurisdiction (Doc. 1 at 3). Although Defendant Shelley Boek is a  
24 resident of Arizona, Defendants assert that she was fraudulently joined. *Id.* at 4-6.  
25 Defendant Provident Funding Associates LP did not join in the removal, but Plaintiff did  
26 not seek remand on this ground.

27 The complaint pleads ten counts: (1) declaratory judgment; (2) injunctive relief;  
28 (3) breach of the covenant of good faith and fair dealing, alleged against Defendants

1 CitiMortgage, CitiGroup, and MERS; (4) breach of contract, alleged against Defendant  
2 CitiMortgage and an unnamed trustee; (5) breach of contract, violation of statute, and  
3 lack of agency authority, alleged against all defendants; (6) breach of contract and lack of  
4 authority, alleged against MERS; (7) breach of contract, alleged against all defendants;  
5 (8) wrongful foreclosure, alleged against MERS, CitiMortgage, and an unnamed trustee;  
6 (9) challenge to A.R.S. § 33-811(B) as violating the Arizona Constitution's separation of  
7 powers doctrine, alleged against all defendants; and (10) breach of contract, alleged  
8 against all defendants. Doc. 1-2.

## 9 **II. Discussion.**

### 10 **A. Summary of Defendants' Arguments.**

11 Defendants move to dismiss on several grounds, some overarching and some  
12 specific. Defendants argue that the complaint violates Rule 8's fair notice requirement  
13 because it is disorganized, and also argue that all claims are barred by A.R.S. § 33-  
14 811(C). Doc. 8 at 4-6. Defendants further assert that all claims must be dismissed  
15 because: (1) Defendants are not required to present the note before they may proceed  
16 with a trustee sale; (2) securitization was permitted by the deed of trust and, in any case,  
17 does not affect Plaintiff's obligations; (3) MERS is a valid beneficiary under the deed of  
18 trust; and (4) the consent order alleged in Count 3 does not create a private right of  
19 action. *Id.* at 7-11. In the alternative, Defendants argue that the claims against Citigroup  
20 and MERSCORP should be dismissed because parent companies are not liable for  
21 subsidiaries' acts absent involvement, and that Shelley Boek must be dismissed as a party  
22 because no facts were alleged showing Boek is personally liable under an alleged cause  
23 of action. *Id.* at 11-12.

24 Defendants further assert that specific counts fail because: (1) Count 3 has not  
25 alleged Plaintiff was deprived of a benefit flowing from the note and deed of trust;  
26 (2) Counts 4, 5, 6, 7 and 10 fail because no breach has been alleged, no damages have  
27 been alleged, and the foreclosure sale has not yet occurred; (3) Count 5 fails because  
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1 MERS assigned its rights as beneficiary to CitiMortgage, CitiMortgage was the only  
2 beneficiary, and CitiMortgage signed the substitution of trustee; (4) Counts 8 and 9 are  
3 not ripe because the foreclosure sale has not yet occurred; and (5) Counts 1 and 2 fail  
4 because Plaintiff lacks standing to obtain equitable remedies of declaratory and injunctive  
5 relief, and declaratory relief is not proper where the complaint fails to state a claim. *Id.* at  
6 13-17.

7 **B. Plaintiff's Arguments, and Discussion.**

8 **1. Preliminary Matters.**

9 Plaintiff responds seeking leave to amend, but does not attach a copy of the  
10 proposed amended complaint as required by Local Rule 15.1. Leave to amend will  
11 therefore be denied without prejudice, and Plaintiff may file a proper motion for leave to  
12 amend in due course. The Court will rule on such motion once it has been fully briefed.

13 Plaintiff fails to address the argument that Shelley Boek was fraudulently joined to  
14 avoid federal diversity jurisdiction. The Court will therefore dismiss the claims against  
15 Ms. Boek without prejudice and retain diversity jurisdiction.

16 **2. *In re Veal*.**

17 Plaintiff asserts as a general matter that *In re Veal*, 450 B.R. 897 (9th Cir. BAP  
18 2011), recently held that the Uniform Commercial Code ("UCC") applies to non-judicial  
19 foreclosures, that the deed of trust follows the note, and that the right to enforce the note  
20 is critical to foreclosure. Doc. 11 at 2-3. Plaintiff reads *Veal* out of context. *Veal*  
21 concerned the issues of standing to assert proofs of claim in a bankruptcy proceeding and  
22 standing to seek leave from a bankruptcy stay. 450 B.R. and 902. The burden in each  
23 case was on the creditor and movant, respectively, and the court held the burden was not  
24 met. *Id.* at 922. The court assumed without deciding, as a result of assumptions made by  
25 the parties, that the UCC governed the note at issue. *Id.* at 908-09 ("Here, the parties  
26 assume that the Uniform Commercial Code ('UCC') applies to the note."). Moreover,  
27 although Arizona law governed the analysis of real parties in interest as to the note, *id.* at  
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1 920-21, Illinois law governed the analysis on mortgage enforcement, *id.* at 916. (The real  
2 property at issue in *Veal* was located in Illinois. 450 B.R. at 902.).

3 By contrast, this case involves non-judicial foreclosure of property under the  
4 power-of-sale clause in a deed of trust governed by Arizona law. Plaintiff fails to explain  
5 why this Court should consider Illinois law when adjudicating rights under an Arizona  
6 deed of trust, or why *Veal* is controlling in this case. Because *Veal* is materially  
7 distinguishable, the Court concludes that it does not control. Plaintiff's response  
8 regarding the enforceability of the note as related to foreclosure (Doc. 11 at 3-7, 11-12) is  
9 equally inapposite because he has not shown foreclosure was attempted or made here  
10 pursuant to the note rather than the deed of trust. Although the security is incident to the  
11 debt under Arizona law, Plaintiff conflates the concepts of "note" and "debt," which are  
12 distinct under Arizona law. *Silving v. Wells Fargo Bank, NA*, \_\_\_ F. Supp. 2d \_\_\_, 2011  
13 WL 2669246, \*9 (D. Ariz. July 7, 2011).

### 14 **3. Remaining Matters.**

15 Plaintiff also argues that CitiMortgage cannot foreclose on the deed of trust  
16 because it does not appear in the chain of title and the original lender did not record the  
17 substitution of trustee. Doc. 11 at 8-11. Plaintiff fails to persuasively address  
18 Defendants' argument regarding MERS's ability to assign the original lender's interest to  
19 CitiMortgage (*e.g.*, Doc. 8 at 9-10), and Plaintiff's citations to non-Arizona law are  
20 unavailing (Doc. 11 at 13-14).

21 Plaintiff fails to address the other arguments made by Defendants. Although the  
22 Court does not conclude that all of Defendants' arguments are sound law, Plaintiff  
23 waived opposition for purposes of this motion on arguments to which responses were not  
24 given.

### 25 **III. Conclusion.**

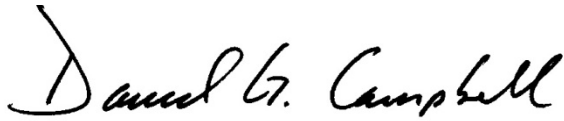
26 For the reasons above, the claims against Moving Defendants shall be dismissed  
27 without prejudice. The motion for attorney fees is denied because Defendants have not  
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1 yet shown they are the successful parties in the contract claims, and have not argued why  
2 the Court should exercise its discretion to award fees under A.R.S. § 12-341.01.

3 **IT IS ORDERED:**

- 4 1. The motion to dismiss (Doc. 8) is **granted** as stated above.  
5 2. The motion for attorney fees (Doc. 8) is **denied**.

6 Dated this 1st day of September, 2011.

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David G. Campbell  
11 United States District Judge  
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